No. 20-1472

In the Supreme Court of the United States

BOECHLER, P.C.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court's cases require a clear, unmistakable statement of congressional intent to rank a limitations period as jurisdictional. But the Commissioner's interpretation of Section 6330(d)(1) is anything but clear. His reading of the text ultimately devolves into the kind of proximity reasoning this Court has repeatedly rejected. He has no compelling response to Section 6330(d)(1)'s statutory history. His primary contextual argument misreads a neighboring subsection. And his theory of congressional ratification has already failed before this Court.

The Commissioner likewise cannot explain how equitable tolling would be out of place in a review scheme infused with taxpayer equity. There is no "tax collection exception" to the presumption of equitable tolling. And the Commissioner identifies no real harm that would arise if the 30-day period could be tolled in compelling cases. This Court should reverse.

ARGUMENT

I. SECTION 6330(d)(1) DOES NOT CONTAIN A JURISDICTIONAL TIME LIMIT

The Commissioner agrees that Congress must "speak clearly" before a statutory requirement can be treated as jurisdictional and that time limits are rarely jurisdictional. Comm.Br.17, 40. This Court has never found a time limit jurisdictional under that clear-statement rule. Section 6330(d)(1)'s 30-day deadline for Tax Court review of a collection due process (CDP) determination should not be the first.

A. Again, Section 6330(d)(1) provides that "[t]he person may, within 30 days of a determination under this section, petition the Tax Court for review of such

determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. § 6330(d)(1). For the Commissioner to prevail, he has to show that the grant of jurisdiction in the parenthetical second clause is clearly conditioned on the taxpayer's compliance with the filing deadline in the first clause. To do so, he relies on "such matter." Those two words do not provide the needed clarity.

1. As written, Section 6330(d)(1) makes no grammatical sense. "[S]uch matter" has to connect with an antecedent earlier in the statute. Comm.Br.19. But there is no prior use of the word "matter" in Section 6330(d)(1). *Cf. Salinas v. United States R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) ("such decision" referred to "[f]inal decision[]" referenced earlier (first alteration in original)). And as a leading usage guide explains, employing "such [noun]" without a corresponding use of that noun is inherently "vague[]." Bryan A. Garner, *Garner's Modern English Usage* 873 (4th ed. 2016). That is a major stumbling block under a rule that requires an "unequivocal" and "unmistakable" statement. *Sossaman v. Texas*, 563 U.S. 277, 287 (2011) (citation omitted); *FAA v. Cooper*, 566 U.S. 284, 291 (2012).

The problem, though, is not just the absence of a prior use of "matter"—it is the absence of any clear antecedent *noun*. So the Commissioner (like petitioner) converts "petition" from a verb to a noun. Comm.Br.20; *see* Pet.Br.19 n.4. But that still leaves the sentence without an action verb. To fix that, the Commissioner adds the word "filed." Comm.Br.20. And to link that back to the deadline earlier in the sentence, he drops "[t]he person may" and adds "which must be." *Id.* Putting that together, the Commissioner says "such matter" is "a petition

seeking Tax Court review of a collection-due-process determination, which must be filed within 30 days of the determination." *Id.*

That the Commissioner needs to rewrite the sentence to give it his preferred jurisdictional meaning should be the end of the analysis under a clear-statement rule. Even he appears to recognize that the relevant statutory phrase *could* bear a nonjurisdictional reading—when he attempts to distinguish the D.C. Circuit's decision interpreting materially identical language in *Myers v. Commissioner*, 928 F.3d 1025 (D.C. Cir. 2019), by pointing to differences in the two statutes' "context" and "purpose." Comm.Br.33.[1] And so long as there is a "plausible" interpretation of the statute that would not treat the limitations period as jurisdictional, the Commissioner's reading cannot prevail. *Cooper*, 566 U.S. at 290; *Sossamon*, 563 U.S. at 287.

2. Petitioner's alternative interpretation is the most natural—and it is certainly "plausible." On that reading, Section 6330(d)(1) accomplishes two things in the same sentence: (i) it confers jurisdiction on the Tax Court to adjudicate petitions for review of CDP determinations and, separately (ii) it instructs the taxpayer to file a petition within 30 days of the CDP determination. Pet.Br.18-21; *see id.* at 30 (other plausible alternatives).

Limiting "such matter" to a "petition [to] the Tax Court for review of such determination" comports with the commonsense principle underlying the last-

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[1] The Commissioner claims the Eighth Circuit was in good company in holding Section 6330(d)(1)'s deadline jurisdictional. Comm.Br.17. But the Ninth Circuit is the only other court of appeals to have squarely decided that question. Pet.14 & n.3.

antecedent rule. *Id.* at 19. It accords with how Congress has used "matter" in other statutes. *Id.* at 20-21. And it does not require the reader to take a phrase restricting the action of a different subject ("a person") and morph it into a phrase modifying a new noun ("a petition"). To the extent linguistics provide guidance when dealing with a statute that is linguistically flawed, that guidance favors petitioner.

3. The Commissioner also appeals to "logic[]." Comm.Br.21. But by logic, he means the belief that Congress must have been referring to a petition that covers certain subject matter *and* meets a filing deadline, because Congress included both concepts in the same sentence. Which comes dangerously close to the "mere proximity" argument all agree has no place in the jurisdictional analysis. *See id.* at 19.

This Court rejected that same reasoning in *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013). Although the provision did not include the word "jurisdiction," the Court-appointed amicus argued that 42 U.S.C. § 1395*oo*(a) listed "three requirements" that "together define the limits" of the administrative board's "jurisdiction." *Auburn Reg'l*, 568 U.S. at 155. The first specified the "claims providers may bring" (*i.e.*, what the Commissioner calls the case's "subject matter"); the second identified the amount in controversy; and the third included the time limit. *Id.* Without disputing that the first two requirements were jurisdictional, the Court refused to treat the time limit as such, even though it was part of the same conditional clause. *Id.* The inclusion of the word "jurisdiction" in Section 6330(d)(1) does not render the Court's prior reasoning illogical here.

The Commissioner's argument also rests on the false premise that the filing deadline for a petition

and the "subject matter" of that petition are indistinguishable. They are not. As he concedes, limitations periods ordinarily are *not* jurisdictional. Comm.Br.40; *see* Pet.Br.16. By contrast, courts usually have jurisdiction over only certain kinds of cases. *E.g.*, 28 U.S.C. § 1331; *id.* § 1251(a); *id.* § 1295(a)(4)(A).

This perfectly natural dichotomy aligns with the ordinary meaning of the word "matter." Pet.Br.20-21 ("matter" means "case," "proceeding," or "litigation"). The Commissioner allows that "matter" often means "case," but insists the word here might mean "a 'case' . . . that was commenced within a particular time." Comm.Br.32-33. Possible, sure. Natural, no. *Bowles v. Russell*, 551 U.S. 205 (2007) (cited at Comm.Br.33), illustrates the point. Subject-matter jurisdiction "obviously extends to 'classes of cases,'" and Congress may further limit a court's jurisdiction to cases filed within a certain period. *Id.* at 213 (citation omitted). The former is obvious; the latter is rare. There is nothing illogical about Congress distinguishing between the two in Section 6330(d)(1).

4. Take the Commissioner's own formulation. "[S]uch matter," he says, "refers to, and the Tax Court's jurisdiction thus encompasses, a petition that Section 6330(d)(1)'s first clause authorizes." Comm.Br.20. In other words, "such matter" is just a cross-reference to everything in the first clause.

Let's look at the first clause on its own, then: "The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination." This is a "'run-of-the-mill' limitations provision." *United States v. Kwai Fun Wong*, 575 U.S. 402, 429 (2015) (Alito, J., dissenting). Without more,

there is no argument that missing the 30-day deadline would have jurisdictional consequences.

Next, to avoid the proximity fallacy, assume that the second clause were a separate section in the Internal Revenue Code providing: "The Tax Court shall have jurisdiction to hear matters described in 26 U.S.C. § 6330(d)(1)." The cross-reference would not make the time limit jurisdictional. *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1851 n.8 (2019). The most natural reading would be that Congress was referring to the subject *matter* described in Section 6330(d)(1), not the time limit. The same holds true when, as here, the two clauses appear in the same sentence. *See supra* at 4.

5. The notion that Congress spoke clearly through a cryptic use of "such matter" is rendered more implausible by the straightforward formulations Congress could have used. In another provision enacted two years earlier, and one *in the very same legislation*, Congress used expressly conditional language to link the Tax Court's jurisdiction to a filing deadline. Pet.Br.21-22; *see* 26 U.S.C. § 6404(g) (Supp. III 1998) (giving Tax Court jurisdiction "if such action is brought within 180 days"); *id.* § 6015(e)(1)(A) (Supp. IV 1999) ("the Tax Court shall have jurisdiction . . . if such petition is filed during the 90-day period").

The Commissioner dismisses the comparison because, he says, the Court has sometimes found "Congress could have said" arguments insufficiently compelling. Comm.Br.22. But neither cited case involved a clear-statement rule. And when unmistakably clear language *is* required, this Court looks to the availability of alternative formulations.

See Henderson v. Shinseki, 562 U.S. 428, 438-39 (2011); *Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012).

The Commissioner argues that the conjunction "and" can sometimes serve a conditional function. Comm.Br.21. True enough. But the simplistic examples the Commissioner offers, which are all phrased as commands, look nothing like Section 6330(d)(1). If Congress had written—"File your CDP petition within 30 days and the Tax Court shall have jurisdiction"—then perhaps he would have a point. As it stands, the baseball and turkey hypotheticals just provide another contrast with the language Congress chose.

B. Broader statutory history and context do not provide the Commissioner with the necessary clarity either. They support petitioner's reading.

1. The statutory history of Section 6330(d)(1) compels a nonjurisdictional interpretation of the filing deadline. As originally enacted, Section 6330(d)(1) split jurisdiction over CDP appeals between the Tax Court and the district courts, imposed a 30-day filing period for both, but included the jurisdictional parenthetical for the Tax Court only. Pet.Br.23. That drafting decision is inexplicable under the Commissioner's jurisdictional reading. *Id.* at 23-25. The Commissioner has three responses; none withstands scrutiny.

First, the Commissioner suggests the 30-day deadline might have been jurisdictional as to district courts too. The Commissioner cites three district court cases saying as much—but he doesn't actually defend them. *See* Comm.Br.35-36. Nor could he; they rely on the kind of reasoning this Court has long since repudiated. The parenthetical in the original Section

6330(d)(1)(A) speaks only to the "jurisdiction" of "the Tax Court." 26 U.S.C. § 6330(d)(1)(A) (Supp. IV 1999). There is no similar language in Section 6330(d)(1)(B). Any argument that the district court deadline was jurisdictional is untenable under this Court's precedents. *See* Pet.Br.15-16.

Second, the Commissioner posits that the deadline might have been jurisdictional just for the Tax Court—and that such a design could be rational. Comm.Br.36. But the Commissioner offers no clue as to what that rationale might have been. The proper forum turned on which court had jurisdiction over the underlying tax liability. *See Moore v. Commissioner*, 114 T.C. 171, 175 (2000). And the same taxpayer sometimes had to file in both courts. *See Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 557-58 (M.D.N.C. 2001). It is implausible that Congress intended to subject taxpayers to the drastic consequences that come with a jurisdictional label based entirely on whether the IRS happened to be collecting an income or excise tax.

Third, the Commissioner asks the Court to ignore the original version of Section 6330(d)(1) and look only at the current text. Comm.Br.36. But this Court often consults prior versions of a statute to understand its present meaning. *See Almendarez-Torres v. United States*, 523 U.S. 224, 232-34 (1998); *see id.* at 265 (Scalia, J., dissenting) (agreeing that "statutory history is a legitimate tool of construction"); *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 900-01 (2019); *id.* at 906 (Gorsuch, J., dissenting) (statutory history is "the sort of textual evidence everyone agrees can sometimes shed light on meaning"). Here, the relevant statutory text did not change; and the same words cannot suddenly mean

something different. There is no reason to think that Congress's decision to eliminate review in the *district court* somehow transformed the nonjurisdictional deadline to seek review in the *Tax Court* into a jurisdictional one.

2. The Commissioner advances two contextual points of his own, both based on Section 6330(e)(1). Neither works.

a. The Commissioner first argues that the jurisdictional status of the limitations period in Section 6330(d)(1) should be discerned from the final sentence in Section 6330(e)(1). That sentence, enacted two years after (d)(1), states: "The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding unless a timely appeal has been filed under subsection (d)(1) . . . ." 26 U.S.C. § 6330(e)(1); *see* Pub. L. No. 106-554, § 313(b)(2), App. G, 114 Stat. 2763A-642 (2000). According to the Commissioner, it would be "incongruous" for the Tax Court to have jurisdiction to review a CDP appeal even if the petition is filed after 30 days, but not have jurisdiction to enjoin a levy under those circumstances. Comm.Br.23-24. That argument's premise—that "timely" means literally filed within 30 days in every instance—is unsound. "Timely" includes petitions that are timely by way of tolling, including equitable tolling.

There are many circumstances in which a petition may arrive at the Tax Court more than 30 days after the CDP determination. CDP petitions are subject to a mailbox rule. 26 U.S.C. § 7502. The 30-day period is automatically suspended during a Chapter 11 bankruptcy. *Id.* § 6330(d)(2). And it is tolled when a petitioner is affected by a disaster or active military deployment. *See* Pet.Br.46. In each of these

circumstances, "the ban on a levy action by the IRS to collect the tax" technically "*lapse[s]* at the end of the 30-day period," but "*revive[s]* if the Tax Court subsequently accept[s]" the petition. Comm.Br.24; *cf.* H.R. Rep. No. 105-599, at 266 (1998) (Conf. Rep.) (referring to a circumstance where the (e)(1) suspension period could lapse and then restart during IRS proceedings). All of these petitions would be deemed "timely" under Section 6330(e)(1)'s final sentence—and the Tax Court would have jurisdiction to enjoin a levy at that point.

The Commissioner says that equitable tolling is different in kind—that it "*excuse*[*s*]" an untimely filing rather than rendering the filing "timely." Comm.Br.25-26. Not so. Equitable tolling, like all tolling rules, pauses a statute of limitations for a period of time based on a particular circumstance and restarts the clock once that circumstance ends. *See Artis v. District of Columbia*, 138 S. Ct. 594, 598 (2018) (tolling means to "hold [the period] in abeyance, *i.e.*, to stop the clock"); *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.* (*CalPERS*), 137 S. Ct. 2042, 2050 (2017) (equitable tolling "pause[s]" statutory time limit); *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (per curiam).

That explains why courts refer to a filing being "timely" by way of equitable tolling.[2] This Court used the word "timely" in exactly this sense in the decision the Commissioner cites (at 25) to prove the opposite. In *CalPERS*, the Court held that *American Pipe &*

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[2] *See, e.g.*, *In re Milby*, 875 F.3d 1229, 1235 (9th Cir. 2017); *Harper v. Ercole*, 648 F.3d 132, 140 (2d Cir. 2011); *Brown v. United States*, 318 F. App'x 749, 750 (11th Cir. 2008) (per curiam); *Boyd v. Ward*, 56 F. App'x 849, 851 (10th Cir. 2002).

Construction Co. v. Utah, 414 U.S. 538 (1974), was a rule of equitable tolling and described the decision as "h[olding that] the individual plaintiffs' motions to intervene were *timely* because the commencement of a class action suspends the applicable statute of limitations" for class members. 137 S. Ct. at 2051 (emphasis added) (internal quotation marks omitted); *cf. Artis*, 138 S. Ct. at 598, 601-02 (describing claim that benefited from statutory tolling as "timely" and explaining equitable tolling works the same way).

So there is no incongruity: if a taxpayer files her petition after 30 days and the Tax Court finds she is eligible for equitable tolling, the petition is "timely," and the Tax Court may both adjudicate the petition's merits *and* exercise its injunctive authority.[3]

b. Even if "timely" meant something different, the upshot is not so bizarre as to impute to Congress a clear intent to make the 30-day deadline in a different subsection jurisdictional. The first sentence of (e)(1), which suspends levy actions, shows why: it provides that the suspension lasts during the pendency of *any* "appeal," timely or not. 26 U.S.C. § 6330(e)(1).

Which means the Commissioner is envisioning a situation in which (i) the taxpayer misses the 30-day deadline, (ii) equitable tolling is warranted, (iii) the IRS had already started to levy during the (usually

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[3] The word "timely" still does work by requiring the Tax Court to determine whether the petition was "timely"—either under the mailbox rule, or because of statutory or equitable tolling—before enjoining a levy action. If none of those things is true, the Tax Court may not enjoin. "Timely" also ensures that the Tax Court has no injunctive power when a petition is filed before the CDP determination. *Cf. Goosby v. Commissioner*, T.C. Memo. 2019-49, 2019 WL 2060795, at *2 (premature filing).

short) time before the petition was filed, and (iv) the IRS does not *stop* levying once the petition is filed, in violation of that first sentence of (e)(1). The Commissioner cites no case where the Tax Court has had to enjoin an improper levy under (e)(1), period. And the Commissioner agrees that the taxpayer could go to a district court if this (unlikely) chain of events were to occur. Comm.Br.24-25. The Commissioner's argument about the significance of (e)(1) is, at most, the proverbial tail wagging the dog.

c. The Commissioner insists the CDP-petition deadline is part of a "reticulated tax-collection scheme" and an "intricate, interlocking statutory structure." *Id.* at 26-27. But that argument rests entirely on the first sentence of (e)(1), which is not particularly intricate. All it does is suspend a handful of limitations periods—*e.g.*, for the government to bring a collection action or a criminal prosecution—once the taxpayer requests a CDP hearing and until those proceedings have run their course.

Section 6330(e)(1) is not unique in that respect; many other provisions suspend those (multi-year-long) limitations periods for various reasons. *See, e.g.*, 26 U.S.C. §§ 6502(a), 6532(a)(2); 26 C.F.R. § 301.7609-5. And nothing suggests Congress was particularly concerned about bringing CDP proceedings to a close within a certain period of time. There is no timeline for how long the Office of Appeals can take to hold a CDP hearing and issue a determination, for instance.

But more to the point, this lone sentence cannot further the Commissioner's jurisdictional reading because the limitations periods are suspended during the pendency of *any* Tax Court appeal. *See* 26 U.S.C. § 6330(e)(1) (first sentence makes no mention of 30-

day deadline or "timely"). So whether the filing deadline is jurisdictional or not, the periods will remain suspended until the appeal is dismissed.

C. The Commissioner also relies on "precedent and practice in American courts" to provide the requisite clear statement. Comm.Br.18 (citation omitted).

1. The recognized form of this argument, applied in *Bowles* and *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), is based on stare decisis. But since this Court has never found Section 6330(d)(1)'s time limit jurisdictional, there is no stare decisis argument to be had. Pet.Br.34.

2. The Commissioner accordingly presses a different variant that has no comparable pedigree. The argument goes as follows: in the decades leading up to the 1998 Act, courts of appeals treated the filing deadlines in 26 U.S.C. § 6213(a) for Tax Court petitions seeking review of deficiency determinations as jurisdictional; Congress was presumptively aware of those decisions; and so when Congress enacted a new filing deadline for Tax Court CDP petitions, the Court should infer Congress intended *that* deadline to be jurisdictional too. Comm.Br.27-30.

This Court rejected a far stronger congressional-ratification argument in *Kwai Fun Wong*—a decision the Commissioner does not confront. There, the United States argued that *this Court* had repeatedly held the Tucker Act's time bar to be jurisdictional; that Congress adopted *the same language* for the time bar in the Federal Tort Claims Act (FTCA); and that the Court should infer Congress intended to incorporate the prior jurisdictional interpretation into the FTCA. 575 U.S. at 412-13. The United States

additionally argued that the courts of appeals had uniformly interpreted the FTCA's time bar to be jurisdictional, and that Congress's reenactment of the same language ratified that view. *Id.* at 426-27 (Alito, J., dissenting). This Court disagreed, finding nothing to support "the Government's claim that Congress . . . wanted to incorporate this Court's [jurisdictional] view of the Tucker Act's time bar—much less that Congress expressed that purported intent with the needed clear statement." *Id.* at 416-17.

The Commissioner's case is far weaker. There is no Section 6213(a) decision from *this Court*. The pre-1998 view of the lower courts did not rest on statutory language. The decisions are drive-by jurisdictional rulings that cite one another and appear to rest on the now-discredited view that all statutory time limits are jurisdictional. *E.g.*, *Tadros v. Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985); *Lewis-Hall Iron Works v. Blair*, 23 F.2d 972, 974 (D.C. Cir. 1928). And Congress *did not even copy the language* of Section 6213(a) when enacting Section 6330(d)(1).[4]

No rule of statutory interpretation would infer congressional intent in such a convoluted manner.

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[4] The Commissioner notes that portions of the legislative history call Section 6213(a)'s filing deadline jurisdictional. Comm.Br.28-29. That is true but (if useful at all) supports petitioner. No comparable statement can be found about Section 6330(d)(1). Pet.Br.25. And the Commissioner leaves out *why* congressional reports noted Section 6213(a)'s (ostensible) jurisdictional status: Congress was amending Section 6213(a) to require the Tax Court to treat a petition filed by the deadline listed in the IRS's notice of deficiency as "timely filed." *E.g.*, S. Rep. No. 105-174, at 90 (1998). That Congress did not include a comparable protection in Section 6330(d)(1) further undermines the Commissioner's theory.

Nor is there anything "bright-line" or "administrable" about the Commissioner's approach. *Henderson*, 562 U.S. at 435-36.

D. The purpose and characteristics of the CDP regime is another "telling" indication the deadline is nonjurisdictional. *Id.* at 440. The Commissioner does not dispute that CDP proceedings are remedial in nature. *See* Pet.Br.26-27. Nor does he dispute that taxpayers seeking review of CDP determinations are "frequently" pro se. Comm.Br.39; *see* Pet.Br.27. He instead tries to chip away at the edges.

1. The Commissioner describes Section 6330(d)(1) as an exception to the general rule that taxpayers must pay a tax first and seek judicial review later. Comm.Br.4, 37. He posits that Congress included a short and harsh, jurisdictional deadline to counterbalance this departure. But the Commissioner points to nothing to support the theory that Congress made this calculated tradeoff. And while this Court has reasoned that a particularly *long* deadline may indicate Congress did not want tolling, *see United States v. Beggerly*, 524 U.S. 38, 48-49 (1998), it has never said the opposite, *see Holland v. Florida*, 560 U.S. 631, 647 (2010).

2. The Commissioner next claims that pro se taxpayers need not worry because the notice of determination tells them about the deadline. Comm.Br.39-40. But the Commissioner ignores the many circumstances where a perfectly compliant notice means nothing—because the taxpayer did not get it in time. *See* Taylor Br.21-22; Ctr. Taxpayer Rights Br.28-30; *see also Sarrell v. Commissioner*, 117 T.C. 122, 123-24 (2001). Nor does the Commissioner address the instances in which the IRS itself gave

taxpayers the wrong due date. *See* Ctr. Taxpayer Rights Br.24-25.

The case of Josefa Castillo (pending in the Second Circuit) presents a compelling example. Castillo entered the CDP process after receiving a collection letter saying she owed thousands of dollars in unpaid income taxes from her small business—a restaurant she had sold years before. Tax Clinics Br.12. It is *undisputed* that Castillo's CDP notice of determination was lost in the mail and never delivered; the IRS also sent a copy to her former attorney, not her attorney of record (a low-income tax clinic). *Id.* at 12-13. As soon as her attorney discovered the notice had issued, Castillo filed a Tax Court petition—which was promptly dismissed for lack of jurisdiction, because the 30-day deadline had expired. *Id.* at 13.

The Commissioner does not explain how information in the notice Castillo never received—let alone a referral to counsel she had already retained—would have made a difference. The Congress that created the collection *due process* regime to address IRS abuses did not intend taxpayers like Castillo to be flat out of luck.

3. That some taxpayers can challenge their underlying tax liability through a deficiency proceeding before collection, and others can bring a refund suit after, is no answer either. Comm.Br.38-39. Congress thought the CDP regime was needed because these other proceedings were not stopping IRS abuses. Pet.Br.4-5, 26-27; Tax Clinics Br.3-5.

And the Commissioner overstates the utility of these alternative avenues in any event. Deficiency proceedings are not available to all taxpayers

(including petitioner). *See* 26 U.S.C. § 6330(c)(2)(B). Nor can a refund suit provide a remedy when the taxpayer does not have funds to pay the disputed tax. *See* Tax Clinics Br.11-13. But more fundamentally, one of the primary purposes of CDP proceedings is to allow the taxpayer to challenge the IRS's proposed collection action itself. *See* 26 U.S.C. § 6330(c)(1)-(2)(A); Pet.Br.38-39. Deficiency proceedings and refund suits are no substitute.

In the end, the Commissioner points these unfortunate taxpayers to Congress. Comm.Br.38. But the characteristics of the review scheme are an indication of congressional intent. *Henderson*, 562 U.S. at 440. And if the harsh consequences just get us back to the need for a clear statement, petitioner can end where it began: there is none.

II. EQUITABLE TOLLING IS AVAILABLE

Section 6330(d)(1)'s nonjurisdictional deadline is subject to equitable tolling in appropriate cases.

A. The *Irwin* presumption in favor of equitable tolling applies. The Commissioner ultimately accepts this point of "hornbook law," *Young v. United States*, 535 U.S. 43, 49 (2002). Comm.Br.17, 41; *see* BIO14-15. But to the extent the Commissioner believes there is room for debate (at 42, 45-46), he is wrong.

The Commissioner's hedge relies on *United States v. Brockamp*, which "assume[d]" that *Irwin* applied to a tax-refund claim deadline. 519 U.S. 347, 350 (1997). In *Brockamp*, the Court paused over whether "a tax refund suit and a private suit for restitution are sufficiently similar" to warrant the presumption. *Id.* But this Court has since explained that a private analogue should not be required. *See Scarborough v. Principi*, 541 U.S. 401, 421-22 (2004); *Holland*, 560

U.S. at 645-46 (applying *Irwin* presumption despite State's argument that habeas actions lack a private analogue); *Holland* Respondent Br.29-30 (No. 09-5327). And even if it were, a primary goal of the CDP regime was to treat the IRS like a private creditor. *See* S. Rep. No. 105-174, at 67 (1998).

Brockamp's hesitation is also explained by the fact that *administrative* claim deadlines were at issue, not court deadlines. As *Auburn Regional* later noted, this Court had "never applied the *Irwin* presumption to an agency's internal appeal deadline." 568 U.S. at 158-59 (citing *Brockamp*). That reason for sidestepping *Irwin* is inapplicable here too.

B. The Commissioner cannot rebut the presumption.

1. The Commissioner begins by noting that the Tax Court "lacks general equitable powers," quoting *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987). Comm.Br.43. But *McCoy* merely stands for the proposition that the Tax Court "may not use general equitable powers to expand its jurisdictional grant beyond . . . Congressional authorization." *Estate of Branson v. Commissioner*, 264 F.3d 904, 908 (9th Cir. 2001). The Tax Court can still employ equitable doctrines to decide a case within its statutory jurisdiction. *See Bokum v. Commissioner*, 992 F.2d 1136, 1140 (11th Cir. 1993). As this Court has explained, the "Tax Court exercises judicial power" and its "function and role in the federal judicial scheme closely resemble those of the federal district courts." *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991). Accordingly, the Tax Court has long exercised various equitable powers. *See Pollock v. Commissioner*, 132 T.C. 21, 33 & n.16 (2009); Harold Dubroff & Brant J. Hellwig, *The United States Tax*

Court: An Historical Analysis 357-85 (2d ed. 2014), https://www.ustaxcourt.gov/resources/book/Dubroff_Hellwig.pdf. The Commissioner offers no reason why equitable tolling should not be among them. *See Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 578 (7th Cir. 1999).

The government itself previously argued that equitable tolling should not turn on "forum-related considerations." United States Reply Br.2, *United States v. June*, 134 S. Ct. 2873 (No. 13-1075) (emphasis omitted). Such an argument, the government explained, "confuses equitable *doctrines* like tolling with the authority to order equitable *remedies*," which is why the Court of Federal Claims (an Article I court) may employ the former even if not the latter. *Id.* at 4-6. Consistent with that reasoning, and following *Henderson*, the Veterans Court (another Article I court) reaffirmed that it may equitably toll the filing deadline. *See Dixon v. McDonald*, 815 F.3d 799, 802 (Fed. Cir. 2016). That logic applies to the Tax Court too.

2. *Brockamp* may be "instructive" (Comm.Br.42), but the instruction is to look at the unique features of the statutory deadline at issue. The judicial-review time limit in Section 6330(d)(1) differs from the administrative-review time limit in *Brockamp* in virtually every respect. Pet.Br.41-43; *see* NTUF Br.12-13.

The Commissioner blows past those distinctions. He argues that, "[l]ike the provision in *Brockamp*," Section 6330(d)(1) cannot "'[be] read as containing an implied "equitable tolling" exception.'" Comm.Br.43 (alteration in original) (citation omitted). But *Brockamp* contrasted Section 6511 with the "simple" and permissive limitations period in *Irwin*—and

Section 6330(d)(1) parallels the latter. *See* 519 U.S. at 350; Pet.Br.37, 40-41. The Commissioner finds a difference: Section 6330(d)(1)'s deadline runs from the date of determination, not the date the taxpayer *receives* the determination. Comm.Br.43. But the Commissioner does not explain why that difference helps him. And precedent indicates it does not. *See Bowen v. City of New York*, 476 U.S. 467, 472 n.3, 480 (1986) (equitable tolling available for deadline running from date of notice's mailing); *cf. Henderson*, 562 U.S. at 438 (also "date of mailing" trigger).

The Commissioner points out that Section 6330(d)(1)'s deadline is "reiterated" once in Section 6330(e)(1) and that there is "one exception in Section 6330(d)." Comm.Br.43. That hardly compares to Section 6511, which "reiterates its limitations several times in several different ways" and sets forth eight "specific exceptions." *Brockamp*, 519 U.S. at 351-52.

The Commissioner is thus left with *Brockamp*'s general observation that tax law is "not normally characterized" by "individualized equities." Comm.Br.42 (citation omitted). But that is demonstrably untrue when it comes to the CDP regime. This particular tax proceeding is infused with individualized, discretionary determinations regarding the equities of specific cases. *See* Pet.Br.38-39; Ctr. Taxpayer Rights Br.22-23. The Commissioner does not argue otherwise.

3. The Commissioner also relies on statutory history, but it is unclear what that adds. He notes that Congress removed one tolling provision in 2006 and added another in 2015. Comm.Br.45. That just makes the Commissioner's position on the relevance of statutory tolling provisions incoherent. If there are no such provisions (or if Congress gets rid of one), that

means Congress did not want equitable tolling. If there *are* statutory tolling provisions (or Congress adds one), that too means Congress did not want equitable tolling. This "heads I win, tails you lose" approach to rebutting a presumption cannot be right.

The Commissioner also overstates the amendments' significance. Section 6330(d)(1) originally provided taxpayers with an extra 30 days to re-file their appeal if they filed in the wrong court. *See* 26 U.S.C. § 6330(d)(1) (Supp. IV 1999). Congress removed that "wrong court" provision in 2006 because *it removed the other court*; Congress gave the Tax Court exclusive jurisdiction over CDP appeals due to "taxpayer confusion" and, to a lesser extent, "taxpayer delay." S. Rep. No. 109-174, at 163 (2005); *see* Pub. L. No. 109-280, § 855(a), 120 Stat. 780, 1019 (2006). That there was no longer reason to provide an automatic 30-day safety valve does not speak to whether Congress believed equitable tolling might be appropriate in individual cases.

The 2015 amendment automatically suspends the 30-day time limit when the taxpayer is prohibited from filing a petition due to Chapter 11 bankruptcy proceedings. Pub. L. No. 114-113, Div. Q, § 424(b)(1)(D), 129 Stat. 2242, 3124 (2015) (codified at 26 U.S.C. § 6330(d)(2)). Section 6213 already had a comparable provision; Congress wanted "[t]o ensure that taxpayers" in CDP proceedings "have rights similar to those of other litigants in the Tax Court." S. Rep. No. 114-14, at 5-6 (2015). That Congress wanted to guarantee tolling in this particular instance again says little about whether Congress wanted tolling in other circumstances on a case-by-

case basis. *See Holland*, 560 U.S. at 647-48; *Young*, 535 U.S. at 53; *Bowen*, 476 U.S. at 480.[5]

4. The Commissioner does not claim the kind of administrability problems the Court feared in *Brockamp*. *See* Pet.Br.41, 45. He instead argues that the possibility of equitable tolling will deprive the IRS of "a clear end date" for when it may begin to collect. Comm.Br.44. But given the variety of circumstances in which collection activity cannot automatically or permanently restart on Day 31, *see supra* at 9-10, this lack of a "clear date" is nothing new.

The Commissioner alludes to concerns about gamesmanship, but Congress has already provided ready means of deterrence. The Tax Court may impose penalties of up to $25,000 for petitions filed "primarily for delay." 26 U.S.C. § 6673(a)(1)(A). If the CDP request is frivolous, the IRS can deny a hearing without any judicial review. *Id.* § 6330(g). The IRS can also levy property while Tax Court proceedings are ongoing if the underlying tax liability is not at issue and the IRS can show good cause. *Id.* § 6330(e)(2). And there is no realistic prospect that taxpayers will deliberately blow the deadline. In the words of one amicus, "[n]o one who files an action against the IRS does so in joyful anticipation that they will have the pleasure of demonstrating to the

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[5] The same day petitioner filed its opening brief, Congress enacted a new general tolling provision for when the clerk's office at the Tax Court is "unavailable." *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 80503, 135 Stat. 429, 1336 (2021). Congress also codified the Commissioner's practice of extending the military, disaster, and terrorism tolling provisions to all Tax Court deadlines. *See id.* § 80502. The Commissioner does not mention these changes, and petitioner agrees they are not relevant.

Court why equitable tolling should be allowed in their case." Taylor Br.14.

5. The Commissioner ends by asking this Court to restate the equitable-tolling standard and by speculating about whether petitioner would prevail under that well-settled test. Comm.Br.46-48. Any factbound application is beyond the scope of the grant of certiorari. It is outside the question presented; no court passed on it below; and the factual record is undeveloped. Once this Court answers the question on which it granted review, the Tax Court can apply the equitable-tolling standard to the facts in the first instance. *See Kwai Fun Wong*, 575 U.S. at 420-21.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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